LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
SEP 6 1973

No. 73-432

In the Supreme Court of the United States

OCTOBER TERM, 1973

UNITED STATES OF AMERICA,

Respondent,

vs.

ANTHONY ESPOSITO,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

THOMAS P. SULLIVAN
RUSSELL J. HOOVER
Attorneys for petitioner
Anthony Esposito

JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

INDEX

PAGE

Opinions below 1

Jurisdiction 2

Questions presented 2

Statutes involved 2

Statement of the case 4

Reasons for granting the writ 7

I. The decision below presents a substantial and novel question regarding the Government's right of appeal under the newly amended Criminal Appeals Act (18 U.S.C. §3731) 7

II. Petitioner was acquitted. The government's appeal violated petitioner's rights under the Double Jeopardy Clause 9

III. This case presents the important issue of first impression of whether Congress has a valid legislative basis for controlling intrastate transactions in cocaine 10

Conclusion 13

Appendix 1—Opinion of the Court of Appeals for the Seventh Circuit, June 12, 1973 ....App. 1

Appendix 2—Order of District Court, July 14, 1972 .....App. 9

Appendix 3—Order of the Court of Appeals for the Seventh Circuit denying petition for rehearing *en banc* .....App. 13

Appendix 4—Indictment .....App. 14

Appendix 5—18 U.S.C. § 801(3)-(6) .....App. 15

TABLE OF AUTHORITIES

Cases Cited

PAGE

Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) 12

Katzenbach v. McClung, 379 U.S. 294 (1964) 12

Perez v. United States, 402 U.S. 146 (1971) 10, 12

United States v. Brewster, 408 U.S. 501 (1972) 9

United States v. Darby, 312 U.S. 100 (1941) 10, 12

United States v. Lane, 461 F.2d 343 (5th Cir. 1972) 12

United States v. Lopez, 459 F.2d 949 (5th Cir. 1972), cert. denied 93 S.Ct. 130 12

United States v. Mather, 465 F.2d 1035 (5th Cir. 1972) 12

United States v. Scales, 464 F.2d 371 (6th Cir. 1972) .. 12

United States v. Sisson, 399 U.S. 267 (1970) 8, 10

United States v. Warwar, 346 F.Supp. 90 (D.P.R. 1972) 12

United States v. Wrightwood Dairy Co., 315 U.S. 110 (1942) 12

Wickard v. Filburn, 317 U.S. 111 (1942) 12

Constitutional and Statutory Provisions

Double Jeopardy Clause, Fifth Amendment to the United States Constitution 2, 10

Criminal Appeals Act effective January 2, 1971 (18 U.S.C. § 3731) 2-3, 5, 7

Criminal Appeals Act, repealed (18 U.S.C. § 3731) 3

Controlled Substances Act of 1970 (21 U.S.C. §841) .. 3, 4, 6, 10

In the Supreme Court of the United States

OCTOBER TERM, 1973

NO.

UNITED STATES OF AMERICA,

Respondent,

VS.

ANTHONY ESPOSITO,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Anthony Esposito, defendant-appellee in the court below, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case.

Opinions Below

The opinion of the Seventh Circuit, not yet reported, is set forth in Appendix 1. The unreported memorandum opinion and order of the District Court in this case from which the appeal to the Seventh Circuit was prosecuted by the government, is set forth in Appendix 2.

Jurisdiction

The opinion and judgment of the Court of Appeals for the Seventh Circuit were entered on June 12, 1973. A petition for rehearing was denied on August 7, 1973 (Appendix 3), and the judgment became final on that date.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

Questions Presented

1. Under the newly amended Criminal Appeals Act (18 U.S.C. § 3731), is the Government permitted to appeal from a post-trial order arresting judgment?

2. Was the district court's order an arrest of judgment, an acquittal, or a directed verdict of not guilty? Included in this question is whether the district court in reality acquitted defendant because the court relied upon facts which are outside the indictment and plea, and which came to the Court's attention solely as a result of evidence introduced at trial?

3. Did Congress have a rational basis for including cocaine within the scope of federal regulation of intrastate activities in the Controlled Substances Act of 1970 (21 U.S.C. §841)?

Statutes Involved

The Fifth Amendment to the United States Constitution provides in part:

> ". . . nor shall any person be subject for the same offence to be twice put in jeopardy. . . ."

The Criminal Appeals Act, as amended effective January 2, 1971 (18 U.S.C. § 3731), provides in pertinent part:

> "In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indict-

ment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution."

The Criminal Appeals Act prior to its 1971 Amendment provided in part as follows (18 U.S.C. § 3731):

"An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

"From a decision arresting a judgment of conviction for insufficiency of the indictment or information, where such decision is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

"From the decision or judgment sustaining a motion in bar, where the defendant has not been put in jeopardy.

"An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases, in the following instances:

"From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section.

"From a decision arresting a judgment of conviction except where a direct appeal to the Supreme Court of the United States is provided by this section."

The Controlled Substances Act of 1970 provides in pertinent part as follows (21 U.S.C. § 841):

"(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

"(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . ."

STATEMENT OF THE CASE

Petitioner was indicted on October 26, 1971. The indictment (set forth in full in Appendix 4) charged Mr. Esposito in two counts with distribution and possession with intent to distribute 206.5 milligrams of cocaine, in violation of 21 U.S.C. § 841.

The case was tried before a jury. During its case in chief, the prosecution called a government informer who testified that he was a friend of petitioner, that he set up a number of meetings with petitioner in June, 1971, and that at one of those meetings petitioner, at the informer's request, delivered to the informer a small amount of a substance which the informer understood to be cocaine. The government also called several federal narcotics agents who testified to their observations of the meetings between petitioner and the informer and to recordings made from electronic eavesdropping which was conducted of the conversations between petitioner and the informer. The government called a chemist to testify that he analyzed the substance which had been delivered by petitioner to the informer and found that it weighed 206.5 milligrams, 47% of which was cocaine.

At the close of the government's case in chief, petitioner moved for a judgment of acquittal on the ground (inter alia) that the government had not proved interstate transportation. This motion was denied.

Petitioner introduced evidence, including his own testimony. No rebuttal evidence was offered by the government. At the close of all the evidence, petitioner moved for judgment of acquittal, and the trial judge reserved ruling on the motion.

The jury returned a verdict of guilty on both counts. Thereafter, petitioner filed motions for new trial and in arrest of judgment. The District Judge granted petitioner's motion in arrest of judgment. His opinion (Appendix 2) states in pertinent part (App. 12):

> "In the case at bar the government made no attempt to prove that the cocaine in defendant's possession was of foreign or interstate origin. The almost infinitesimal quantity of cocaine involved herein (47% of approximately 206.5 milligrams) is clearly in and of itself insufficient to raise any presumption of being in interstate commerce or of having any perceptible effect on interstate commerce. *Cf. Leary* v. *United States*, 395 U.S. 6 (1969). The fact that the defendant 'distributed' this cocaine to a friend does not advance the government's case. The court finds and concludes that the offense of which this defendant stands convicted is not one against the Federal government or one which Congress has power to prohibit in the manner attempted by 21 U.S.C. § 841.
>
> "The defendant's Motion in Arrest of Judgment is therefore granted."

The government appealed. The Court of Appeals for the Seventh Circuit reversed and vacated the trial court's order, and remanded the case for entry of a judgment in accordance with the jury verdict. (Appendix 1.)

The Court of Appeals rejected petitioner's argument that the District Court's order was not one from which the government was entitled to appeal under the newly amended Criminal Appeals Act. (18 U.S.C. §3731.) The Court held that although the government's right to appeal in criminal cases is now "limited to dismissals of indictments", the trial judge's post-trial order arresting

judgment was ". . . tantamount to the dismissal of an indictment. It comes, therefore, within the meaning of 'dismissal' as used in §3731, and is appealable." (App. 7.)

The Court held that the District Court had not acquitted petitioner by relying on evidentiary matters, but rather had merely recited certain evidence ". . . to provide a framework for the decision on the constitutionality of the statute." (App. 4, fn. 3.)

The Court of Appeals also held that a valid basis exists for Congress to control purely intrastate transactions in cocaine in the Controlled Substances Act of 1970. (21 U.S.C. §841.)

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW PRESENTS A SUBSTANTIAL AND NOVEL QUESTION REGARDING THE GOVERNMENT'S RIGHT OF APPEAL UNDER THE NEWLY AMENDED CRIMINAL APPEALS ACT (18 U.S.C. §3731).

This Court has not yet rendered an opinion with respect to this important statute, which took effect on January 2, 1971.

The court below has expanded the literal scope of §3731 to permit prosecution appeals not only from orders "dismissing an indictment" (specifically referred to in the Act), but also from orders which are "tantamount to dismissal." We submit that this interpretation of the new statute is erroneous because:

(1) There is a clear and well-settled distinction between the pre-trial dismissal of an indictment and the post-trial arrest of a judgment. Congress recognized that distinction in the prior appeals statute, but *deleted* from the new Act the authority for government appeals from orders and arresting "a decision arresting judgment of conviction." *

(2) Moreover, in adopting the new Act, Congress *deleted* from the proposed bill language which would have extended the government's right to appeal to all orders "terminating a prosecution in favor of a defendant" other than acquittals. (S. 3132, H.R. 14588, 91st Cong. 1st Sess. 1969.) Instead, Congress limited the government's right to appeal to orders "dismissing an indictment."

---

* We quote in full the applicable provisions of the repealed statute at page 3 above.

These two facts of legislative history cannot be reconciled with the Court of Appeal's ruling that Congress intended the new act to encompass post-trial orders in arrest of judgment which the court deems "tantamount to the dismissal of an indictment." (App. 7.)

(3) Furthermore, the Court's conclusion flies in the teeth of a fundamental principle it recognized earlier in its opinion (App. 6), "that the Criminal Appeals Act is to be strictly construed against the Government, *Will* v. *United States,* 389 U.S. 90, 97 (1967) . . ."

An order arresting judgment is a familiar judicial act, explicitly authorized in Rule 34 of the Federal Rules of Criminal Procedure. See *United States* v. *Sisson,* 399 U.S. 267, 280-2 (1970). An order arresting judgment is obviously different from one which dismisses an indictment, and therefore is not one from which the Government may appeal.

Instead of interpreting the plain language of the Act "strictly" and "against the government," the Court of Appeals stretched Congress' words so as to accomplish a result the Court deemed desirable, but which is simply not warranted by the words which Congress used. However tempting, this is not the function of courts.

We respectfully pray that this Court accept for review this important case of first impression, in order to clarify the scope of the government's right of appeal under the new Criminal Appeals Act.

II.

PETITIONER WAS ACQUITTED. THE GOVERNMENT'S APPEAL VIOLATED PETITIONER'S RIGHTS UNDER THE DOUBLE JEOPARDY CLAUSE.

Petitioner argued below that the District Court's order was an acquittal, precluding appeal, because the trial judge based his post-trial ruling in part upon evidence introduced at the trial.

The Court of Appeals agreed with petitioner's view of the law (App. 3):

> "For jeopardy purposes the question to be decided is whether the trial court 'bottomed' his order 'on factual conclusions not found in the indictment' or 'on the basis of evidence adduced at trial.' *United States v. Sisson*, 399 U.S. 267, 288 (1970). If the court's order 'arresting judgment' is based upon evidence produced at trial, it is in the nature of an acquittal and is not appealable under the double jeopardy clause."

The Court held, however, "that the trial judge did not base his order on the evidence adduced at trial." (App. 3.)

In Appendix 4 we set out the indictment. The Court will find nothing in the indictment relating to (1) the informer being a "friend" of petitioner, or (2) the quantity of cocaine involved in the case, *viz.*, "47% of approximately 206.5 milligrams." (App. 12.) Those facts appear only in the trial testimony. The Court of Appeals was simply wrong in saying that "The facts as they are set forth in the order appealed here were taken from the indictment . . ." (App. 5, fn. 3.)

The Court of Appeals' reliance on *United States* v. *Brewster*, 408 U.S. 501 (1972) (App. 4, fn. 3), is misplaced. In *Brewster*, the trial judge referred generally to "the

facts of this case''—which this Court construed to mean ''the facts alleged in the indictment'' (408 U.S. at 507)—whereas the trial judge here made explicit reference to, and relied upon, facts which came to his knowledge only from testimony introduced at the trial.

We respectfully submit that petitioner's rights under the Double Jeopardy Clause have been violated, and that the Court of Appeals has deviated from this Court's ruling in *United States* v. *Sisson,* 399 U.S. 267 (1970), warranting the Court in accepting this case for plenary review.

III.

THIS CASE PRESENTS THE IMPORTANT ISSUE OF FIRST IMPRESSION OF WHETHER CONGRESS HAS A VALID LEGISLATIVE BASIS FOR CONTROLLING INTRASTATE TRANSACTIONS IN COCAINE.

The constitutional question raised here relates to that portion of the Controlled Substances Act of 1970 which regulates intrastate transactions in cocaine (18 U.S.C. §841 (a)(1).) We submit that there is no rational basis for including cocaine within the congressional finding that effective regulation of interstate transactions in certain drugs requires regulation of intrastate dealings in those drugs.

We begin with the principle that, under the Commerce Clause, Congress may control intrastate transactions if *but only if* there is a rational legislative basis to justify extension of federal power to intrastate activities. See, e.g., *Perez* v. *United States,* 402 U.S. 146 (1971); *United States* v. *Darby,* 312 U.S. 100 (1941). The burden is on Congress to demonstrate the need to extend its powers to intrastate activities.

Congress made no attempt to legislate with regard to intrastate transactions in cocaine until 1970 when it enacted the Controlled Substances Act. * That Act contains findings explaining why Congress must control intrastate transactions in the controlled drugs (21 U.S.C. §801); those findings are reproduced in Appendix 5.

Our position is simply this—regardless of the basis Congress had for making these findings as to other drugs (such as heroin), no rational basis exists for these findings as they relate to *cocaine.*

We cite in the footnote the various hearings, reports, materials and debates relating to the Act.** The Court will find that the congressional hearings elicited a great volume of evidence relating to drugs such as amphetamines, barbituates and marijuana. The Court will also find, however, only a few references to cocaine, none of which supports

---

* 18 U.S.C. §§1114, 1952 (1970); 21 U.S.C. §§321, 333-334, 360, 372, 381, 801-803, 811-812, 821-829, 841-851, 871-886, 901-904 (1970); 42 U.S.C. 242 (1970).

** 116 Cong. Rec. 33609 (1970). *See, also,* 116 Cong. Rec. 33603-667, 35475-490, 35494-497, 35506-511, 35516-539, 35549-560, 35562-563, 36651-655, 36880-885 (1970). Hearings on H.R. 13742 and H.R. 17436 before the House Committee on Ways & Means, 91st Cong., 2d Sess. (1970); Hearings on S. 1895, S. 2590 and S. 2637 before the Subcommittee to Investigate Juvenile Delinquency of the Senate Committee of the Judiciary, 91st Cong., 1st Sess. (1969). Hearings on S. 1816 and S. 2608 before the Special Subcommittee on Alcoholism & Narcotics of the Senate Committee on Labor & Public Welfare, 91st Cong., 1st Sess. (1969); Hearings on S. 3562 before the Special Subcommittee on Alcoholism & Narcotics of the Senate Committee on Labor & Public Welfare, 91st Cong., 2d Sess. (1970). Hearings on H.R. 11704 and H.R. 18743 before the Subcommittee on Public Health & Welfare of the House Committee on Interstate & Foreign Commerce, 91st Cong., 2d Sess. 1970). Sen. Rep. No. 91-613; 91st Cong., 1st Sess. (1969); *see also* Sen. Rep. No. 91-1341; 91st Cong., 2d Sess. (1970); H. Rep. No. 91-1444, 91st Cong., 2d Sess. (1970).

the legislative finding that intrastate distribution of cocaine must be controlled in order that interstate distribution of that drug can effectively be controlled.

In the cases in which this Court has upheld statutes governing intrastate transactions, the Court has cited detailed congressional findings which support the basis for federal action under the Commerce Clause.* There are no such findings relating to cocaine in the materials which form the basis for the statute enacted in 1970.

The courts which have ruled on this issue have not made a careful search for a rational legislative basis for control of intrastate transactions in cocaine.** The court below merely cited two prior cases, one of which is not in point.

The importance of the fundamental issue involved is obvious. The question is of nationwide and immediate concern. We respectfully pray for a full review on the merits by the Court.

---

* E.g., *Perez* v. *United States*, 402 U.S. 146, 155-157 (1971); *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 252-258 (1964); *Katzenbach* v. *McClung*, 379 U.S. 294, 299-304 (1964); *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110, 119-121 (1942); *Wickard* v. *Filburn*, 317 U.S. 111, 118-128 (1942); *United States* v. *Darby*, 312 U.S. 100, 119-121 (1941).

** *United States* v. *Lopez*, 459 F.2d 949 (5th Cir. 1972), cert. denied 93 S.Ct. 130; *United States* v. *Lane*, 461 F.2d 343 (5th Cir. 1972); *United States* v. *Mather*, 465 F.2d 1035 (5th Cir. 1972); *United States* v. *Warwar*, 346 F.Supp. 90 (D.P.R. 1972). The Court below relied on *Lopez* and a case which is not in point because it involved marijuana—*United States* v. *Scales*, 464 F.2d 371 (6th Cir. 1972).

Conclusion

For the reasons set forth above, petitioner Anthony Esposito prays that this Court grant a writ of certiorari to review the judgment of the Seventh Circuit in this case.

Respectfully submitted,

THOMAS P. SULLIVAN
RUSSELL J. HOOVER
Attorneys for Petitioner
Anthony Esposito

JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611

September 6, 1973.